Supreme Court, U.S.
FILED
OCT 22 1979
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

79-649

BERNARD L. AVCOLLIE,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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Petitioner Bernard L. Avcollie respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Connecticut. That judgment reversed the trial court's judgment setting aside a jury's verdict of guilty and entering judgment of acquittal.

Opinions Below

The judgment and opinion of the Connecticut Supreme Court on the merits of the State's appeal, entered in this proceeding on July 24, 1979, is reported at 41 *Connecticut Law Journal* No. 4 at page 1 and is reproduced as Appendix A *infra*. The ruling of the Connecticut Supreme Court on petitioner's Motion to Dismiss on, *inter alia*, Double Jeopardy grounds is reported at 174 Conn. 100, 384 A2d 315 (1977) and reproduced as Appendix B *infra*. The pronouncement of the trial court setting aside the jury's ver-

dict of guilty and entering judgment of acquittal is unreported and is reproduced as Appendix C *infra*.

Statement of Jurisdiction

The decision of the Supreme Court of Connecticut was rendered on July 24, 1979. The jurisdiction of this Court is invoked under 28 United States Code, Section 1257(3).

Questions Presented

1. Does the Double Jeopardy Clause bar a State appeal from a judgment of acquittal entered by the trial court after a jury verdict of guilty, where the acquittal was based on insufficiency of evidence, and the court characterized the jury's verdict as "being influenced by extraneous matters and a failure to understand the charge"?

2. Does the Due Process Clause permit an element of an offense to be found proven beyond a reasonable doubt when the only evidence in support of that element is the opinions of two medical witnesses whose opinions are not expressed in terms of "reasonable probability" or "beyond a reasonable doubt"?

Constitutional Provisions Involved

U.S. Const., Amend. V:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

U.S. Const., Amend. XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Statutory Provision Involved

Connecticut General Statute 53a-54a.

(a) A person is guilty of murder when, with intent to cause the death of an other person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

(c) Murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed as provided by section 53a-54a.

Statement of the Case

At approximately 2:00 A.M. on October 30, 1975, petitioner and a neighbor discovered the body of petitioner's wife floating in the family swimming pool. Resuscitation was unsuccessful and she was pronounced dead. On November 21, 1975, petitioner was indicted for his wife's murder

in violation of Connecticut General Statutes Section 53a-54a.

On July 20, 1977, a jury returned a verdict of guilty which was immediately set aside by the trial court which entered judgment of acquittal, and discharged petitioner.

The State charged that petitioner had caused his wife's death by strangulation and offered the testimony of two forensic pathologists who each testified that it was his "opinion" that Mrs. Avcollie died as a result of strangulation; neither witness testified that his opinion was held with "reasonable probability" or "beyond a reasonable doubt". The defense offered the testimony of three forensic pathologists who testified that Mrs. Avcollie had died from accidental drowning.

Following the jury's verdict of guilty, defense counsel renewed a prior motion for, *inter alia*, judgment of acquittal. The trial court granted the motion stating that it felt that the State had not proven its case beyond a reasonable doubt. The court went on to state that it did not know what had influenced the jury but evidently it had been a failure to understand the charge and that extraneous matters may have interfered with a fair trial as a result of outside influences. The State asked for permission to appeal (as required by Connecticut General Statute Section 54-96) and was denied.

The jury was summoned, their verdict "noted" by the court, and then informed of the trial court's actions. The court then ordered petitioner discharged and his bond released.

The State later moved that the trial court revoke the aforementioned rulings and on July 22, 1977, the court again denied permission to appeal and denied the State's

motion to vacate its ruling setting aside the jury's verdict and entering judgment of acquittal.

Finally, on August 1, 1977, the trial court *sua sponte* summoned counsel for another hearing on whether to permit an appeal. On August 3, 1977 the State was granted permission to appeal.

The defense moved to dismiss the appeal on grounds of double jeopardy, discharge, and unseasonable permission to appeal. This motion was denied by the Connecticut Supreme Court, *State* v. *Avcollie,* 174 Conn. 100, 384 A.2d 315 (1977).

The State's appeal was heard and decided by the Connecticut Supreme Court, *State* v. *Avcollie,* 41 Conn. L.J. No. 4, p. 1 (July 24, 1979), which reversed the trial court and remanded with direction to render judgment of guilt and to impose sentence.

Reasons for Granting the Writ

The issues herein raise important constitutional questions concerning the due process requirements under *In re Winship,* 397 U.S. 358 (1970) regarding the level of proof required in criminal trials and the ramifications under the Double Jeopardy Clause of a judicial determination of insufficiency of said evidence.

Petitioner calls into question the reviewability of a trial judge's finding of insufficient evidence *vis a vis* the Double Jeopardy Clause, a question never heard by this Court, although indirectly addressed when not at issue.

The petitioner also asserts that his state criminal conviction, supported solely by speculative evidence on the key element of cause of death, violated his right to due process. This issue proffers an important question of

criminal justice, seeking this Court's determination of whether *Jackson* v. *Virginia*, —— U.S. ——, 61 L. Ed. 2d 560 (1979) requires expert medical opinion to be expressed with a certitude commensurate with the level of proof required of the prosecution.

I.

The Double Jeopardy Clause Precludes Appellate Review of a Judgment of Acquittal Entered by Trial Court After a Jury Verdict of Guilty.

The Double Jeopardy Clause mandates that when a jury returns a guilty verdict but the trial judge sets that verdict aside and enters judgment of acquittal because of insufficiency of evidence, no further proceedings may be conducted to review that judgment without placing the defendant twice in jeopardy. Such a review of the factual evidence by an appellate court, purportedly empowered to assess the factual sufficiency of evidence and to find or "reinstate" guilt beyond a reasonable doubt, subjects the defendant to a second jeopardy in that appellate court.

An appeal requiring a review of all the evidence involves "jeopardy". In *Breed* v. *Jones*, 421 U.S. 519 (1975) this Court defined jeopardy in the following way:

> Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution.
>
> . . . .
>
> As we have observed, the risk to which the term jeopardy refers is that traditionally associated with "actions intended to authorize criminal punishment to vindicate public justice."

Id. at 528, 529. It cannot be doubted that one tried and convicted by a jury and acquitted by the court has been subjected to jeopardy. Nor should it be doubted that when the State appeals, the acquitted person is again placed in jeopardy, by being subjected to the same ". . . heavy pressures and burdens—psychological, physical, and financial . . ." *id.* at 530, by virtue of his awareness of the ". . . purpose and potential consequence . . ." *id.* at 529, of such an appeal. Appellate review allows the prosecution a chance to convince a second tribunal that its evidence is sufficient to warrant a finding of guilt beyond a reasonable doubt; it allows the prosecution to place before the appellate tribunal all trial testimony and exhibits as well as furnishing a forum for the prosecution to argue the sufficiency of this evidence.

The constitutional doctrine that a second jeopardy can occur in an appellate court was first promulgated by this Court in *Kepner* v. *United States*, 195 U.S. 100 (1904). *Kepner* involved a bench trial in which the judge rendered a judgment of acquittal based upon insufficiency of the evidence and the prosecution appealed the judge's verdict. The appellate court entered judgment of guilty based upon its review of the record. The Court held that Mr. Kepner had been subjected to double jeopardy in the appellate court.

Swisher v. *Brady*, 438 U.S. 204 (1978), furnishes recent acknowledgement that appellate review can constitute a second jeopardy. In *Swisher*, a juvenile charged with a criminal offense was by law subjected to an initial hearing before a Master, who heard the evidence and made a finding of insufficient evidence. The rules of practice allowed the prosecution to have a judge review the evidence heard by the Master. Upon review of the transcript, the judge reversed the Master's finding. The majority ac-

knowledged the viability of *Kepner, Swisher* at 217, n. 15, but deemed *Kepner* inapplicable because it felt that the procedure in *Swisher* was merely the equivalent of a single proceeding begun before a master and concluded before a judge. Justice Marshall in dissent viewed the process as involving two separate proceedings, and found *Kepner* to be not only viable but controlling. He then employed an analogy which is precisely the case of Petitioner herein.

> Viewing the master and judge in terms of their relative functions, I think the appropriate analogy is between a trial judge and an appellate court with unusually broad powers of review. In the case before us, the Masters had made unequivocal findings on the facts, that the State had not proved its case, and the State sought to have the judge overturn these findings.

Swisher at 222 (footnote omitted) (dissenting opinion). Justice Marshall condemned this trial court/appellate court double prosecution by concluding that

> [t]his proliferation of levels at which a defendant—juvenile or adult—must defend himself against an adjudication of guilt is precisely the kind of evil that the Double Jeopardy Clause was designed to forbid . . . .
>
> . . . This rule is designed in part to ensure that the government not be able to bolster its case by additional evidence *or arguments* once it believes that its evidence has not persuaded the first tribunal.

Id. at 227 (emphasis added). *See, also, Brown* v. *Ohio,* 432 U.S. 161 (1977) (the double jeopardy clause protects the accused from attempts to relitigate the facts underlying a prior acquittal); *Fong Foo* v. *United States,* 369 U.S. 141 (1962) ("The verdict of acquittal was final and

could not be reviewed . . . without putting the defendants twice in jeopardy and thereby violating the Constitution." *Id.* at 143, *quoting United States* v. *Ball,* 163 U.S. 662 (1896)).

Because there was a jury verdict of guilty in petitioner's trial preceding the judgment of acquittal, petitioner must also address certain language in *United States* v. *Jenkins,* 420 U.S. 358 (1975) and *United States* v. *Scott,* 437 U.S. 82 (1978). While the facts in *Jenkins* did not involve a defendant who was found guilty by a jury and then acquitted by the trial judge, the opinion stated:

> When a case has been tried to a jury, the Double Jeopardy Clause does not prohibit an appeal by the Government providing that a retrial would not be required in the event the Government is successful in its appeal. When this principle is applied to the situation where the jury returns a verdict of guilty but the trial court thereafter enters a judgment of acquittal, an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict.

Id. at 365 (citation omitted). Although *Jenkins* was overruled by it's author speaking for the majority in *United States* v. *Scott, supra,* the Court in *Scott* apparently perpetuated this dictum by noting that

> [i]n Jenkins, we had *assumed* that a judgment of acquittal could be appealed where no retrial would be needed on remand . . . . Despite the Court's heavy emphasis on the finality of an acquittal in Martin Linen and Sanabria v. United States . . . neither decision expressly repudiates this *assumption.*

Scott, 437 U.S. at 91 n. 7 (emphasis added) (citations omitted).

But, it should be pointed out that in neither *Jenkins* nor *Scott* did this Court have under consideration an appeal brought by a prosecution which claimed that its evidence entitled the jury to find the defendant guilty, and that the trial judge had erroneously set aside a guilty verdict and entered judgment of acquittal. *Jenkins* involved a court trial on a charge of refusal of military induction. After the evidence was heard, the trial judge dismissed the indictment and the Government appealed. This Court ruled that, because it could not be determined whether Jenkins was acquitted on the facts or whether the indictment was dismissed based upon a legal decision construing the statute allegedly violated, Double Jeopardy would preclude any further proceeding. In *Scott,* defendant's indictment for narcotics violations was dismissed at the close of all the evidence because of pre-indictment delay. It must be remembered that the prosecution sought to appeal and this Court ruled that the prosecution's appeal could be entertained without offending the Double Jeopardy Clause because Scott himself had successfully sought to end his trial *without any submission to the fact-finder of his guilt or innocence. In neither Jenkins nor Scott did a jury deliberate, let alone return a verdict.*

Furthermore, the above-cited quotations from *Jenkins* and *Scott* do not *expressly* aim their authorizations at situations where a trial court has set aside a jury's verdict of guilty and entered a judgment of acquittal because of insufficient prosecutorial evidence. The *Jenkins* "assumption" is not necessarily aimed at evidentiary insufficiency as the improper reason for the judgment of acquittal, because a trial court can enter judgment of acquittal for reasons other than insufficient evidence, for example when

a criminal conviction would violate the defendant's constitutional rights, *see e.g. United States* v. *Sisson,* 399 U.S. 267 (1970).[1]

The "assumption" in *Jenkins* was made by its author without the benefit of hearing the arguments of someone in the circumstances assumed therein. This Court was therefore deprived of an adversarial presentation in which to consider the reasons militating against this assumption. The language was further compromised when *Jenkins* was overruled in *Scott* by their common author's concession that

> . . . although our assessment of the history and meaning of the Double Jeopardy Clause in . . . Jenkins . . . occurred only three Terms ago, our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that Jenkins was wrongly decided.

Id. at 86-87. Because the *Scott* Court reversed its *Jenkins* position on the merits, a position directly addressed in the adversarial presentation of *Jenkins,* the Court should at least question whether that "assumption" in *Jenkins* decided *without* being in such actual controversy, should survive *Jenkins'* demise. The petitioner submits that his case constitutes an opportunity for the exposition of the arguments that were not heard by the Court in *Jenkins,* (nor in *Scott*), as to whether the "assumption" that a judgment of acquittal can be appealed should apply to petitioner.

A writ of certiorari would allow the Court to clarify the following language in *Jenkins* which, as it now stands,

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[1] In *Sisson,* the district court found that defendant could not be convicted for refusal of military induction without his First Amendment rights being violated.

illustrates why petitioner *has* been subjected to double jeopardy. *Jenkins* held that where resolution of factual issues was still necessary following a defendant's initial trial, Double Jeopardy would be violated by a second factual resolution. But certainly *any* prosecutorial appeal to review a trial judge's finding of insufficient evidence would by definition be a ". . . further proceeding of some sort, de oted to the resolution of factual issues going to the elements of the offense charged . . ." *Jenkins* at 370. The fact that these proceedings occur in an appellate forum should be of no consequence for Double Jeopardy purposes, *Kepner, supra.*

While the "assumption" in *Jenkins* is appended to a factual situation where the defendant was tried to the court, the situation in *United States* v. *Sisson, supra,* is precisely that of petitioner herein. Mr. Sisson was convicted by a jury for failure to report for induction into the military. The trial judge then entered an "arrest of judgment" which the Supreme Court found to be an acquittal. In deciding that the Court did not have jurisdiction to entertain the government's direct appeal under the version of the Criminal Appeals Act then in effect, 18 U.S.C. Section 3731, the majority noted:

> [q]uite apart from the statute, it is, of course, well settled that an acquittal can not be reviewed, on error or otherwise, without putting the defendant twice in jeopardy, and thereby violating the Constitution.

399 U.S. 267 at 289.

Burks v. *United States,* 437 U.S. 1 (1978) decided the same day as *Scott,* lends further support to petitioner's position that the Double Jeopardy Clause precluded review of petitioner's acquittal by the Connecticut Supreme Court. In *Burks,* a court of appeals ruled that there was insufficient

evidence to support a jury's guilty verdict, but instead of entering a judgment of acquittal, that court remanded for a determination of the proper remedy. *Burks* was granted certiorari to determine whether the court of appeals' failure to direct an acquittal violated the Double Jeopardy Clause.

The Court examined the ramifications of judicial review and Double Jeopardy protections as they relate to trial error as opposed to insufficiency of the evidence adduced at trial. The Court noted that retrial was permissible following reversal for trial error because "immunity from punishment" was too high a price for society to pay for reversible trial error, *id.* at 15. The Court went on to distinguish reversal of a guilty verdict for trial error and reversal for evidentiary insufficiency as follows:

> . . . [R]eversal for trial error as distinguished from evidenciary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process that is defective in some fundamental respect, *e.g.* incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct . . . .
>
> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we neces-

> sarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty . . .
>
> . . . Given the requirements for entry of judgment of acquittal, the purposes of the Clause would be negated were we to afford the government an opportunity for the proverbial "second bite at the apple".

Id. at 15-17 (footnotes and citations omitted).

The above is equally applicable to petitioner herein. The prosecution was given its chance to muster whatever proof it could assemble, but the trial court found that the State's case was so lacking that as a matter of law the jury could not properly have returned a verdict of guilty. It should make no difference, that this ruling was made in a trial rather than an appellate court. As Mr. Justice Douglas noted in his concurrence in *Sapir* v. *United States,* where,

> . . . as in the Kepner case, the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would prevent a new trial of the old offense. I see no difference when an appellate court orders a judgment of acquittal for lack of evidence.

Sapir v. *United States,* 348 U.S. 373 at 374 (1955) *as quoted in Burks,* supra at 7.

Double Jeopardy Conclusion

When the Connecticut Supreme Court ruled that the trial judge's acquittal was reviewable, they accepted the *Jenkins* "assumption" as controlling. But the most that the author of that assumption would say in its support, when overruling *Jenkins* in *Scott,* was that it had not theretofore been "expressly repudiated", *id.* at 437 n. 7. It is time for this Court's "vastly increased exposure to the various facets of the Double Jeopardy Clause" to include hearing an adversarial, "case-or-controversy" presentation of the reasons why a trial judge's acquittal for insufficient evidence is beyond review. This Court has long held that a judgment of acquittal is final and that review thereof infringes upon the Double Jeopardy Clause. A preexisting jury verdict of guilty should in no way affect the trial judge's entry of an acquittal when that acquittal is founded on insufficient evidence.

II.

To Entitle a Jury to Make a Finding of Guilt Beyond a Reasonable Doubt, Opinion Testimony, Which Is the Only Evidence in Support of an Element of the Offense Charged, Must Be Expressed With Certainty Commensurate With the Standard of Proof.

At petitioner's trial, the only evidence offered by the State from which the jury could find that petitioner's wife died from strangulation was the testimony of two pathologists: Dr. Gross gave an opinion, based upon his autopsy of Mrs. Avcollie, that she died of strangulation; Dr. Lukasch also held the opinion that Mrs. Avcollie was strangled; and that strangulation was "a" reasonable cause of death. Connecticut's standard for admissibility of ex-

pert medical opinion in civil cases on medical causation requires that the medical witness be at least certain enough to express his opinion as being based upon "reasonable medical probability". This was first held in *Madore* v. *New Departure Mfg. Co.*, 104 Conn. 709, 134 A. 259 (1926) where the Connecticut Supreme Court examined the issue of proximate cause for personal injuries and the certainty necessary before the trier of fact could reach a conclusion. The court held as follows:

> Necessarily the decision is often controlled by the conclusion reached by medical experts. That opinion, if relied upon by the commissioner or trier, must be found to be an honest one, and one which the rational mind would reasonably reach upon the established facts. If upon the facts the medical expert is merely willing to testify that the disease might have, or was likely to have, resulted from the employment, or the conditions under which it was carried on, but is unwilling to go further and testify that, in his opinion, taking into consideration all of the facts presented and considering every other hypothesis suggested, it was reasonably probable that the disease resulted from the employment, and therefore the employment was its direct cause, the commissioner or court should not conclude that the disease did result from the employment, unless the facts outside this medical testimony fairly warrant that conclusion. . . . We do not intend by this to exclude from consideration the testimony of the medical witness who merely states that the accident or disease might have resulted from the employment, or the conditions under which it was carried on; it may be invaluable, as an expression of a cautious opinion, in corroboration of other testimony. What we do intend is that the trier cannot himself reach a definite conclusion when he has nothing to rely upon but the opinion of a medical witness who is unable with all of his professional learning and experience to reach the definite conclusion which the court is required to reach upon the same facts in making an award.

Id. at 714 (citation omitted).

This standard of certainty is that applicable to a civil case, where the trier must merely be persuaded by a preponderance of the evidence. This standard of "reasonable medical probability" was not met in petitioner's trial where the Constitution requires that the trier of fact be persuaded beyond a reasonable doubt of each element of the offense, *Patterson* v. *New York*, 432 U.S. 197 (1977). In its opinion in petitioner's case, the Connecticut Supreme Court noted that

> [t]he elements of intentional murder with which the defendant was charged under General Statutes Section 53a-54a are: (1) intent, (2) causation, and (3) death by killing as opposed to death by accident or suicide.

Appendix at 10a. It is elements (2) and (3) which the State sought to prove via Drs. Gross and Lukasch. This Court has ruled that ". . . expert testimony . . . is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand," *Paris Adult Theatre* v. *Slayton*, 413 U.S. 49, 56, n.6 (1973). Obviously medicine and forensic pathology would fall into this category. But how can a jury be convinced beyond a reasonable doubt of each element of the offense and, in particular causation and homicide, if the only sources from which the jury may draw to make this decision are expert opinions which do not themselves rise to the level of probability, let alone

beyond a reasonable doubt. If an area is not within lay understanding without expert assistance, the law should not permit the trier of fact to speak with greater certainty than those who were the sole witnesses in support of an element of the offense charged.

> [T]he trier cannot himself reach a definite conclusion when he has nothing to rely upon but the opinion of a medical witness who is unable with all of his professional learning and experience to reach the definite conclusion which the trier is required to reach upon the same facts in making an award.

Madore, supra, at 714.

In Petitioner's trial, the medical testimony was the only source of evidence of two elements of the offense; if the jury was to reach a verdict of guilty it was to be because they were persuaded beyond a reasonable doubt that Mrs. Avcollie was strangled and that this strangulation caused her death. While probability may be the touchtsone of admissibility, Fed. Rules Evid. Rule 401, 28 U.S.C., it is not a quantitative measure of the sufficiency of the evidence where proof beyond a reasonable doubt is constitutionally required, *see, generally, Notes of Advisory Committee on Proposed Rules,* 28 U.S.C.A. p. 85 ("Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of sufficiency of the evidence.") The Court's attention is invited to *Jackson* v. *Virginia,* —— U.S. ——, 61 L. Ed. 2d 560 (1979), where this Court was called upon to determine the appropriate standard of review in federal habeas corpus cases where a petitioner claims there was insufficient evidence to support his state criminal conviction. The Court held that due process required proof beyond a reasonable doubt as determined by a rational trier of facts, and in discussing the prior "no evidence" rule

of *Thompson* v. *Louisville,* 362 U.S. 199 (1960) the Court ruled that *In re Winship,* 397 U.S. 358 (1970) changed the *Thompson* rule.

> That the Thompson "no evidence" rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. "A mere modicum of evidence may satisfy a 'no evidence' standard . . . ." . . . Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence . . . could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt.

Jackson, supra, 61 L. Ed. 2d at 574 (citations omitted). Nor, in petitioner's case, should it be seriously argued that expert opinion evidence which does not even rise to the level of probability could be sufficient evidence of guilt beyond a reasonable doubt.

Due Process Conclusion

The absence of expert medical testimony expressed with a level of certainty of at least probability let alone beyond reasonable doubt, precludes a jury's verdict of guilty, when said expert testimony is the only evidence introduced on an element of the offense. To allow jurors to conclude and express more certainty than experts expressed as the sole support of an element of the offense

charged is to allow a conviction based on surmise, guess and speculation.

Respectfully submitted,

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Certificate of Service

This is to certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, on this 24th day of October, 1979, to Counsel for Respondent, State of Connecticut: Francis McDonald, State's Attorney, 300 Grand Street, Waterbury, Connecticut.

JOHN D. JESSEP

Appendices

Appendices

Appendix A

CONNECTICUT REPORTS
SUPREME COURT

FEBRUARY TERM,1979

STATE OF CONNECTICUT v. BERNARD AVCOLLIE

COTTER, C. J., LOISELLE, BOGDANSKI, LONGO and PETERS, Js.
Argued February 8—decision released July 24, 1979

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Waterbury and tried to a jury before *Cohen, J.;* verdict of guilty, which the court set aside; judgment of acquittal, from which the state, on the granting of permission, appealed to this court. *Error; judgment directed.*

Francis M. McDonald, Jr., state's attorney, with whom were *Bradford J. Ward* and *Walter H. Scanlon,* assistant state's attorneys, and, on the brief, *Joseph A. Hill,* assistant state's attorney, for the appellant (state).

Theodore I. Koskoff and *John D. Jessup,* for the appellee (defendant).

LOISELLE, J. At approximately 2 a.m. on the morning of October 30, 1975, the defendant, Bernard Avcollie, and his neighbor, Carmine DiMaria, found the body of Avollie's wife, Wanda, floating in the family swimming pool. The two men pulled her from the pool. An unsuccessful attempt at mouth-to-mouth resuscitation was made. Mrs. Avcollie was pronounced dead by Dr. Joseph Vincitorio, the medical examiner of Waterbury, at about 2:47 a.m. He referred the matter for an autopsy. On November 21, 1975, a grand jury returned a true bill accusing Bernard Avcollie

of intentionally murdering Wanda Avcollie in violation of § 53a-54a of the General Statutes.

The defendant elected a trial by jury. The jury returned a verdict of guilty, which was immediately set aside by the trial court, which stated that the defendant was acquitted. The state requested permission to appeal, which the trial court initially denied. On its own motion, the trial court reconsidered its decision and granted the state permission to appeal pursuant to General Statutes § 54-96. On appeal, the state raises three issues: (1) whether the trial court had the power to set aside the guilty verdict when the defendant had not made a motion for a directed verdict at the close of all the evidence; (2) whether the trial court properly set aside the verdict of guilty in the light of the evidence presented to the jury; and (3) whether the trial court properly excluded certain evidence. The defendant in his brief raises a fourth claim: whether this appeal violates his constitutional guarantee against double jeopardy.

I

Because of its significance, we will address the defendant's double jeopardy claim first. This court previously determined that there was no double jeopardy bar to the state's appeal in this case. *State* v. *Avcollie,* 174 Conn. 100, 384 A.2d 315 (1977). The defendant, however, strenuously urges that we review our ruling on double jeopardy in that case in light of the five cases on the subject which were subsequently decided by the Supreme Court of the United States on June 14, 1978, and the overruling of a case claimed to have been relied upon as its authority by this court.

An examination of *Burks* v. *United States,* 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *Greene* v. *Massey,* 437 U.S. 19, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1978); *Crist* v. *Bretz,* 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978); *Sanabria* v. *United States,* 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978); and *United States* v. *Scott,* 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978); reaffirms our determination of the issue of double jeopardy which was reached previously in *State* v. *Avcollie,* supra. In that case, this court cited *United States* v. *Jenkins,* 420 U.S. 358, 95 S. Ct. 1006, 43 L. Ed. 2d 250 (1975), as authority for its ruling. In *United States* v. *Scott,* supra, the principal holding in *United States* v. *Jenkins* was overruled. That holding, however, was not the one relied upon by this court. Actually, the quotation from *United States* v. *Jenkins,* supra, cited in *State* v. *Avcollie,* supra, was a reiteration of the rule enunciated in *United States* v. *Wilson;* 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975), which was decided the same day as *Jenkins.* In *Sanabria* v. *United States,* supra, the principle stated in *United States* v. *Wilson* and *United States* v. *Jenkins* cited by this court as authority for its holding was reaffirmed. It was held in *United States* v. *Wilson,* supra, that when a case has been tried to a jury, the principle of double jeopardy does not prohibit an appeal by the prosecution providing that a retrial is not required in the event the prosecution is successful in its appeal. Thus, where a jury returns a verdict of guilty but the trial court thereafter renders a judgment of acquittal, an appeal is permitted and double jeopardy does not attach. None of the cases of the Supreme Court which were handed down since the ruling of this court is inconsistent with *State* v. *Avcollie,* supra.

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II

The state's first contention is that the trial court was without power to set aside the verdict because the defendant did not make a motion for a directed verdict at the close of all the evidence as was required by Practice Book, 1963, § 255 (now Practice Book, 1978, § 321).[1] We disagree. The procedural setting was as follows: The defendant made a motion at the close of the state's case for a dismissal, a directed verdict and judgment of acquittal upon which the court reserved decision. After this, both sides offered more evidence. The defendant did not renew his motion for a directed verdict at the close of all the evidence. The case was submitted to the jury on the charge of murder. After deliberating for some time, the jurors sent a note to the trial judge indicating they stood eleven to one for conviction. The court then gave the "Chip Smith" charge to the jury as to their duty to respect the views of each other. At this time, over an objection by the state, the defendant made a motion for a directed verdict. The court again reserved decision on the motion. Shortly thereafter the jury returned a guilty verdict. After the foreman announced the verdict in open court, the defense counsel asked that the jury be excused, prior to the acceptance of the verdict. In the absence of the jury, the defendant renewed his previously made motions and moved under Practice Book, 1963, § 255 to set

[1] Practice Book, 1963, § 2310 (now Practice Book, 1978, § 899), providing for a motion for acquittal upon a verdict of guilty, did not govern this situation because it did not apply under Practice Book, 1963, § 2433, as amended (now Practice Book, 1978, § 1022), which provided that "[t]hese rules shall take effect on October 1, 1976, and shall govern all criminal proceedings in which an arrest is made or a summons issued on or after said date." See *State* v. *Avcollie*, 174 Conn. 100, 108 n 4, 384 A.2d 315 (1977).

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aside the verdict. The court ordered the verdict set aside and directed an acquittal.

On appeal the state asserts that the trial court had no authority or jurisdiction to hear and grant such a motion because Practice Book, 1963, § 255 which controlled at the time required a motion for a directed verdict at the close of all the evidence. *Goldberger* v. *David Roberts Corporation,* 139 Conn. 629, 633-34, 96 A.2d 309 (1953). In *Belchak* v. *New York, N.H. & H. R. Co.,* 119 Conn. 630, 637, 179 A. 95 (1935), it was held that "[t]he trial court has inherent power to set aside the verdict, even though no motion has been made." See also *Munson* v. *Atwood,* 108 Conn. 285, 288, 142 A. 737 (1928); *Brown* v. *New Haven Taxi Cab Co.,* 92 Conn. 252, 255-56, 102 A. 573 (1917). Furthermore, it was held in *Casey* v. *McFarlane Bros. Co.,* 83 Conn. 442, 76 A. 515 (1910), that the trial court need not have a motion before it as a prerequisite to setting a verdict aside if one is eventually made. See also Maltbie, Conn. App. Proc. § 181.

The policy behind the requirement of § 255 was the giving of notice to the trial court. The defendant fulfilled this requirement by twice making a motion for a directed verdict. While we acknowledge that following established procedures is a necessary prerequisite for a just and fair trial, we do not believe that strict adherence to form has talismanic significance. The trial court's power to set aside a verdict is inherent; the Practice Book merely lays out an advisable manner of exercising it. The defendant, moreover, did make the requisite motion, although not in the correct sequence. Therefore, the trial court did have the power to grant it.

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III

The central issue raised by the state is whether the trial court erred in setting aside the jury's verdict in light of the evidence adduced at trial. It is the function of the jury to consider evidence, draw logical deductions and make reasonable inferences from facts proven, that is, to decide guilt or innocence. *State* v. *Hicks,* 169 Conn. 581, 585, 363 A.2d 1081 (1975); *State* v. *Williams,* 169 Conn. 322, 336, 363 A.2d 72 (1975); *State* v. *Benton,* 161 Conn. 404, 410, 288 A.2d 411 (1971). This power, however, is not absolute. As noted above, the court has an inherent power to set verdicts aside. Maltbie, Conn. App. Proc. § 181.

The court serves a supervisory function vis-a-vis the jury in this situation: "In passing upon a motion to set aside a verdict, the trial judge must do just what every juror ought to do in arriving at a verdict. The juror must use all his experience, his knowledge of human nature, his knowledge of human events, past and present, his knowledge of the motives which influence and control human action, and test the evidence in the case according to such knowledge and render his verdict accordingly. A juror who did not do this would be remiss in his duty. The trial judge in considering the verdict must do the same, or fail in the discharge of that function which the law has laid upon him; and if, in the exercise of all his knowledge from this source, he finds the verdict to be so clearly against the weight of the evidence in the case as to indicate that the jury did not correctly apply the law to the facts in evidence in the case, or were governed by ignorance, prejudice, corruption or partiality, then it is his duty to set aside the verdict." *Howe* v. *Raymond,* 74

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Conn. 68, 72, 49 A. 854 (1901). In *Roma* v. *Thames River Specialties Co.,* 90 Conn. 18, 19-20, 96 A. 169 (1915), this court enumerated several of the reasons for setting aside a verdict: "It was the court's duty to set aside the verdict if its manifest injustice was so plain and palpable as to justify the suspicion that the jury or some of its members were influenced by prejudice, corruption or partiality. *Fell* v. *Hancock Mutual Life Ins. Co.,* 76 Conn. 494, 496, 57 Atl. 175; *Burr* v. *Harty,* 75 Conn. 127, 129, 52 Atl. 724. And this is true even if the evidence was conflicting, and there was direct evidence in favor of the . . . [party], who prevailed with the jury. *Bradbury* v. *South Norwalk,* 80 Conn. 298, 300, 68 Atl. 321; *Cook* v. *Morris,* 66 Conn. 196, 211, 33 Atl. 994; *Kinne* v. *Kinne,* 9 Conn. 102, 106. Clearly the action of a jury may be as unreasonable, and as suggestive of being produced by improper influences, in passing upon the credibility of witnesses and in the weighing of conflicting testimony, as in any other respect. It is one of the duties of a judge, in the due performance of his part in jury trials, to see to it that such influences, apparently operating upon the jury, do not prevail, and manifest injustice thereby be done."

It has also been held that the trial court is obligated to overturn the jury's verdict when it is based on physically impossible conclusions: a verdict should be set aside "[w]here testimony is thus in conflict with indisputable physical facts, the facts demonstrate that the testimony is either intentionally or unintentionally untrue, and leave no real question of conflict of evidence for the jury concerning which reasonable minds could reasonably differ." *Budaj* v. *Connecticut Co.,* 108 Conn. 474, 476, 143 A. 527 (1928). The final test is "whether the jury could reason-

ably have concluded, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt." *State* v. *Chetcuti,* 173 Conn. 165, 172, 377 A.2d 263 (1977).

The trial court in overturning the jury's verdict in the present case did not file a memorandum of decision as required by Practice Book, 1963, § 256 (now Practice Book, 1978, § 322). It, however, did explain orally to the jury that it granted the motion because it felt that the state did not carry its burden of proof.[2] In the memo-

[2] The court explained its action to the jury as follows:

"It is fundamental that the trier may not reach a conclusion of guilty where the facts established by the evidence, including those reasonably and logically inferred from other proven facts, are rationally consistent with the innocence of the accused.

A conclusion of guilty requires proof beyond a reasonable doubt. And proof to that extent is proof which precludes every reasonable hypothesis, except that which it tends to support, and it is consistent with the defendant's guilt and inconsistent with any other rational conclusion.

In criminal jury trials, the State has the burden of producing evidence from which the jury may rationally conclude that the defendant has been proven guilty of the essential elements of the crime beyond a reasonable doubt.

The Court does not feel that the burden was borne here by the State. . . . The Court would feel that a manifest injustice would take place when this verdict is so plain as to justify relief from the Court.

I don't know what has influenced the jury but evidently it has been a failure to understand the charge in this case and whatever extraneous matters may have interfered with a fair trial as a result of outside influences.

The Court feels under those circumstances that the verdict should be set aside and the judgment of acquittal entered.

I realize that this is a case of circumstantial evidence but even cases of circumstantial evidence must be proven beyond a reasonable doubt.

As I have said before, and I have said it before in my charge on several occasions, and I repeat it. The law never permits inferences

randum of decision in which it granted permission to the state to appeal, it stated that the verdict was set aside because "the evidence, under the law, [was] not sufficient to justify a finding of guilty beyond a reasonable doubt." [3] Nothing in either the transcript of its remarks or memorandum of decision indicates that the court's action was

to be drawn or assumptions depending upon other inferences or assumptions. [See the discussion on the permissability of inferences on page 8 (infra).]

It is the Court's feeling that this case does not warrant conviction under the proof as brought by the State. . . . The Supreme Court has spoken many times, many times in the past, about the judge's responsibility in the trial of a criminal case. And on many, many occasions, probably long before even you or I were born, the Supreme Court has entered a mandate that said that the trial court has a responsibility when a motion for a judgment of acquittal is entered, either before or after a jury verdict and that the Court's responsibility, if the evidence is not sufficient to support a verdict, that it should be set aside. And I so do it here.

. . . Ladies and gentlemen of the jury, your verdict has been noted by the Court. In accordance with the Court's responsibility assumed by me, it is the Court's feeling that either you did not understand the charge or that you did not weigh all of the evidence properly, and that the verdict should be set aside. And I am so doing it at this time."

[3] The trial court's memorandum read as follows:

"The basis for entering a judgment of acquittal is where the state's relevant and reliable evidence is insufficient or insubstantial to warrant a conviction by the jury. Such was the case here. The crime of murder *as alleged in the indictment* was not, in my opinion, proved beyond a reasonable doubt. Rather, the state's evidence of guilt, taken as a whole, was so weak that, upon my best consideration and judgment, I was of the clear view that 'the reasoning mind could not reasonably reach a conclusion other than that the evidence, under the law, [was] not sufficient to justify a finding of guilty beyond a reasonable doubt.' *State* v. *Torello,* 100 Conn. 637, 643, 124 A. 375, 377 (1924). Under these circumstances—the government having failed to meet its constitutional burden—it was my duty to order the entry of a verdict of acquittal; and not to have done so would have resulted in a serious miscarriage of justice."

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based on a belief that the jury had been influenced by prejudice, corruption or partiality. See *Howe* v. *Raymond,* supra, 72.

In *Burr* v. *Harty,* 75 Conn. 127, 129-30 (1902), we distinguished between the inquiry made by the trial court in ascertaining whether the jury's verdict should be set aside and our review of the trial court's action: "[w]hen this matter comes before us upon proceedings in error, the question is substantially that presented to the trial court, but with this limitation: the trial court has seen and heard the witnesses and all the transactions of the trial that may properly influence the triers in reaching their conclusions from the evidence, and is bound to consider this judicial knowledge in drawing its inference that the verdict is or is not manifestly against evidence. We can consider only the printed testimony, and in considering that must make allowance for the absence of those facts which were before the trial court." In this appeal, neither the record nor either brief refers to any considerations on which the court based its decision to overturn the verdict other than the insufficiency of the evidence.

The elements of intentional murder with which the defendant was charged under General Statutes § 53a-54a are: (1) intent, (2) causation, and (3) death by killing as opposed to death by accident or suicide. The state has the burden of proving every element of the crime beyond a reasonable doubt. *Patterson* v. *New York,* 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); *Mullaney* v. *Wilbur,* 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); and *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

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The central factual issue in the present case was whether Wanda Avcollie was strangled to death. The state contended that she was; the defendant put on evidence to indicate that she drowned, either by accident or as the result of a suicide attempt.

The state is obligated to prove that death was neither suicide nor the result of an accident. *State* v. *Hanna,* 150 Conn. 457, 461, 191 A.2d 124 (1963). When the cause of death is to be determined by medical testimony, it has to be established by that testimony beyond a reasonable doubt. *Commonwealth* v. *Radford,* 428 Pa. 279, 236 A.2d 802 (1968). The state and the defense presented contradictory expert medical testimony on this issue. The state's witnesses said Mrs. Avcollie was strangled to death; the defendant's witnesses testified that she drowned. Opinion testimony of an expert is not binding on the trier. The jury was not bound by the opinion of any one of the expert witnesses and could reject in whole or in part his opinion regardless of whether they believe or disbelieve the subordinate facts on which the opinion was based. *Birgel* v. *Heintz,* 163 Conn. 23, 30, 301 A.2d 249 (1972); *Desmarais* v. *Pinto,* 147 Conn. 109, 111, 157 A.2d 596 (1960).

The issue, therefore, resolved itself into one of credibility to be determined by the jury as trier of fact. *State* v. *Panella,* 168 Conn. 532, 534, 362 A.2d 953 (1975); *State* v. *Malley,* 167 Conn. 379, 381, 355 A.2d 292 (1974); *State* v. *Bradley,* 134 Conn. 102, 105, 55 A.2d 114 (1947). The jury were confronted with conflicting evidence on nearly every point. The choice of the more credible evidence was for them to make. *Novella* v. *Hartford Accident & Indemnity Co.,* 163 Conn. 552, 316 A.2d 394 (1972); *Petrizzo* v. *Commercial Contractors Corporation,* 152 Conn. 491, 499, 208 A.2d 748 (1965); *Desmarais* v. *Pinto,* supra, 110. The evi-

dence must be given a construction which is most favorable to the sustaining of the jury's verdict. *State* v. *Panella,* supra, 534; *State* v. *Benton,* 161 Conn. 404, 409, 288 A.2d 411 (1971).

In support of its contention that Wanda Avcollie was strangled, the state called two medical experts to testify: Dr. Elliot Gross, chief medical examiner of Connecticut, and Dr. Leslie Lukash, chief medical examiner of Nassau County, New York. Dr. Gross performed the autopsy on Mrs. Avcollie some twelve hours after her body was found. Dr. Gross testified in part as follows: He observed petechial hemorrhages in the conjunctiva and on the inner surface of the eyelids, some slight froth in the nostrils, and hemorrhages along the reflected scalp. Upon removing Mrs. Avcollie's clothing, he noted an unhooked gold circlet with a pendant around her neck. Under the pendant was a slight superficial laceration of the skin. There were other lacerations and contusions around the neck where the necklace had been. There were no broken bones of the cervical spine. There were hemorrhages on the sternothyroid muscle, on parts of the larynx and the thyroid cartilage. There were no fractures in the cartilages of the larynx or the thyroid bone. There was a fine froth in the trachea and the bronchi. There were recognizable food particles: meat fragments, string beans, fragments of lettuce and seeds of perhaps a cucumber in the stomach. No recognizable food was found in the duodenum. There were no recognizable tablets or medication in the stomach. He found hemorrhages in the deep muscles of the neck. He opined that the hemorrhages in the deep muscles, in the tips of the thyroid cartilage and on the left side of the neck were interrelated. Based on the interrelation of the injuries, Dr. Gross concluded that Wanda Avcollie died from asphyxia by strangulation. The lungs were dry. Dr. Gros opined that because of the lack of fluid in the lungs, Wanda Avcollie did not drown.

Dr. Lukash testified that in was his opinion that Wanda Avcollie died by strangulation. He was not present at the autopsy, but based his opinion on the records and photographs of the autopsy that revealed lacerations around the neck, deep hemorrhages around the cartilages of the voice box, the hemorrhages in the eyeballs, under the eyelid and around the scalp tissue, the area of contusion on the neck and lineal abrasions of the skin.

To rebut the state's witnesses' testimony that Wanda Avcollie died of strangulation, the defendant presented three expert medical witnesses: Dr. Michael Baden, at the time of trial deputy chief medical examiner for the city of New York, Dr. Cyril Wecht, former coroner of Allegheny County, Pennsylvania, and Dr. Werner Spitz, the chief medical examiner of Wayne County, Michigan.

Dr. Baden viewed all the tissues of Mrs. Avcollie which Dr. Gross had preserved and examined all autopsy findings, the toxicological reports, and all photographs of the body taken at the scene and at the University of Connecticut Health Center at Farmington as well as the photographic slides taken during the autopsy. Dr. Baden was asked for his opinion on the cause of death of Mr. Avcollie, taking into consideration the following: There was a "thud" when the body was dropped faced down on the cement as it was being removed from the swimming pool; none of the people who viewed the body at poolside observed any foam discharging from the mouth, but one person noticed a discharge from her nostrils; Dr. John Elsner, the first physician to examine the body at 2:20 a.m., observed neither rigor mortis nor lividity; Dr. Vincitorio, who pronounced

Mr. Avcollie dead, observed the beginnings of rigor mortis; Mr. Avcollie grasped his wife under the chin as he tried to get her out of the pool; one of the funeral directors saw a clear white discharge coming from Mrs. Avcollie's nose; the funeral director moved the body twice from stretcher to stretcher by lifting and pulling Mrs. Avcollie by the neck; according to Dr. Stolman, the state toxicologist, Mrs. Avcollie's stomach contained five ounces of food; her blood contained both alcohol and a small amount of pentobarbital; Mr. Avcollie testified that the family had meat and rice or cauliflower and a salad for supper, Lisa Avcollie testified they had meat, cauliflower and a salad; and there was a string bean in the stomach when the autopsy was performed. Based on his review of the above evidence and taking into consideration all of the above testimony, Dr. Baden's opinion was that Mrs. Avcollie was alive when she went into the pool and died as a result of drowning and that many of her injuries occurred post mortem as the result of handling or as a result of the protocol used by Dr. Gross in the autopsy. Dr. Baden, in explaining his opinion, testified that it was based on the fact that in a poolside photograph Mrs. Avcollie's complexion was pale which is consistent with drowning, explaining that in strangulation there would be a more bluish hue to the face; that there was an absence of any signs of struggle—Mrs. Avcollie's clothes and makeup were intact; that the hemorrhages in the whites of the eye are present in both strangulation and drowning; that the injuries around Mrs. Avcollie's neck could as well have been caused by post-mortem handling; that there was no trauma to the neck directly beneath these superficial contusions and where there was subsurface trauma, there was no injury to the skin directly above it; and that the small hemorrhages noted

after the scalp was reflected was caused by the autopsy itself. Dr. Baden further noted that neither the hyoid bone, the thyroid cartilage nor the cricoid cartilage was fractured as one would expect in the manual strangulation of an adult and that the thyroid cartilage, the hyoid bone or the cricoid cartilage would be fractured in 90 to 95 percent of the cases of adults with ossification of these organs who were manually strangled. Dr. Gross observed that there was ossification with Mrs. Avcollie. Dr. Baden further testified that the hemorrhages to the superior tips of the thyroid cartilage and the left sternothyroid muscle could have been caused by post-mortem handling, by being laid face down after death in a fetal position, as had been done, or by a blow, as well as by strangulation.

Dr. Cyril Wecht testified for the defense after reviewing Dr. Gross' tissue slides, photographs and Kodachrome slides. Dr. Wecht's opinion was that Mrs. Avcollie died as a result of drowning. As a result of his review, Dr. Wecht found that the condition of Wanda Avcollie's clothes, her complexion, the presence of foam and froth in the mouth, nostrils, bronchi, trachea and larynx, the lack of petechrae in pleural, epicardial and pericardial surfaces, the fact that the cartilages of the neck were intact and that the hyoid bone was not fractured were all consistent with drowning.

Dr. Wecht detailed three types of strangulation: ligature, mugging-type and manual. According to his evaluation, Mrs. Avcollie's injuries were not consistent with any one of them.

Dr. Werner Spitz also testified for the defense, relying upon the facts that Mrs. Avcollie was dropped when she was taken from the pool; that prior to her death she had been hauled out of the car by her shoulders and wrists;

that the first doctor on the scene noticed no rigor mortis or lividity; that Dr. Vincitorio who arrived later noticed no lividity but observed the beginnings of rigor mortis; that the defendant grabbed Mrs. Avcollie by the chin in dragging her from the pool; that the funeral director noticed she was purging from the nose; that at the scene her blouse was buttoned to the top; and that she was grasped by the neck several times when moved from stretcher to stretcher. On the basis of the above facts and the pictures, slides and histological slides in evidence, Dr. Spitz came to the conclusion that on the basis of a "reasonable medical probability," Mrs. Avcollie died of drowning and that the hemorrhages and other injuries that could have been produced by strangulation were all consistent with death by drowning. Dr. Spitz would not have listed this case as a homicide.

It was incumbent upon the state to prove, beyond a reasonable doubt, that the defendant was the one who committed the murder; *State* v. *Tillman*, 152 Conn. 15, 202 A.2d 494 (1964); and that he possessed the specific intent to cause the death of Wanda Avcollie, the intent to achieve this result being an essential element of the crime charged. *State* v. *Holley*, 174 Conn. 22, 25-26, 381 A.2d 539 (1977); *State* v. *Bzdyra*, 165 Conn. 400, 403, 334 A.2d 917 (1973); *State* v. *Bitting*, 162 Conn. 1, 5, 291 A.2d (1971). The intent of the actor is a question for the trier of fact, and the conclusion of the trier in this regard should stand unless it is an unreasonable one. *State* v. *Holley*, supra, 26; *State* v. *Ruiz*, 171 Conn. 264, 271, 368 A.2d 222 (1976); *State* v. *Bzdyra*, supra.

To establish who committed the murder and the necessary intent, the state offered the following evidence: Mrs. Avcollie had made up her mind to confront the defendant

that evening about his extra-marital relationship and to tell him she wanted a divorce. The defendant and Mrs. Avcollie were alone together, drinking and talking the night Mrs. Avcollie was killed. Their discussion became quite heated. They moved outside to the pool area to avoid waking the children.

Mrs. Avcollie ate dinner between 6 and 6:30 p.m. When the autopsy was performed, recognizable food particles were found in the stomach. No recognizable food was found in the duodenum. Expert testimony established that the stomach empties following the ingestion of a meal within three to five hours. Mrs. Avcollie's stomach contents set the time of death at around 11:30 p.m.

Dr. Stolman examined specimens of her blood and body tissues and determined that at the time of death Mrs. Avcollie had a blood level alcohol of .02 percent, representing about one ounce of 86 proof whiskey which would have very little effect on the nervous system. He also found a blood level of .03 milligrams per hundred milliliters of pentobarbital, too small an amount to produce any observable effect on the nervous system.

The total pentobarbital found in Wanda Avcollie's body was less than one-half of a 100 milligram pill. The dosage of no more than one-half of a 100 milligram pill was taken less than five hours before death. The defendant testified that Wanda Avcollie took a pill at around 5:30 to 5:45 p.m. There was no valium in Wanda Avcollie's body when the autopsy was performed.

In his first statement to police, the defendant denied moving his car that night. A neighbor's child testified that sometime after midnight she saw the defendant's car turn in the driveway. After the defendant got out of the car, the witness saw a light go on which was not an interior

car light and then she saw the defendant carrying a large object in both of his arms.

The defendant gave the following version of the events of the evening of Wanda Avcollie's death: After their children went to bed, Mr. Avcollie mixed a couple of "stiff" drinks for himself and his wife. They put on some records and began to talk. Mrs. Avcollie was depressed over her father's death. At 10:45 p.m. the defendant made two more stiff drinks for his wife and himself. While they were drinking their second drink, the defendant told Mrs. Avcollie that he no longer loved her and that he wanted to move out. The discussion was getting noisy, so they moved outside to the pool area. At this point the defendant made a third pair of drinks. Mrs. Avcollie was very upset and cried for about 45 minutes. Mrs. Avcollie suggested that they have another drink, but the defendant refused and insisted they go inside because Mrs. Avcollie was sobbing a great deal and slurring her words. At this point, Mrs. Avcollie announced that she was going for a ride. The defendant took the keys away from her because he felt she was drunk. She slapped the defendant and kicked him in the shins. He grabbed her wrists to stop her. She broke away and yelled that she was going across the street to the DiMarias' to sleep.

The defendant went inside, lay down on the couch and fell asleep. This was somewhere around midnight. He woke up around 1 a.m. and went upstairs where he found pills and empty pill bottles strewn around everywhere. One was an empty bottle of valium. He became alarmed and started looking for his wife. According to the first statement he gave the police, the defendant said after looking outside he called the DiMarias and some other neighbors, the Browns, at 1:20 a.m. He checked the pool area twice.

The third time, he found Wanda's body. The defendant told the police he did not go anywhere in his car that night.

"When the conclusion is one dependent upon how conflicting testimony shall be resolved, the trial court should ordinarily leave the case to the jury." *State* v. *Torello*, 100 Conn. 637, 647-48, 124 A. 375 (1924). The evidence on the cause of death was conflicting on nearly every point, but the defendant did not contend nor did he present any evidence that the state's theory was based on physically impossible facts and conclusions. It was the jury's prerogative to decide which version to accept as long as there was evidence to support it beyond a reasonable doubt. The court overturned the verdict on the ground that the evidence was insufficient. On appeal here, the issue is whether the jury could have reasonably come to the conclusion that Wanda Avcollie was strangled by the defendant.

The trial court did not find that the testimony of any of the state's expert witnesses was based on physically impossible conclusions or that the jury was prejudiced or influenced by extraneous influences. On the basis of the printed record,[4] which we are limited to on appeal, we find that the jury's conclusion that Wanda Avcollie was strangled was established beyond a reasonable doubt if the evidence of the state was believed and that of the defendant was rejected.

There was no direct evidence to link the defendant to the slaying nor to establish his intent. However, "[t]he law recognizes no distinction between circumstantial evidence and direct evidence so far as probative force is concerned." *State* v. *Smith*, 138 Conn. 196, 200, 82 A.2d 816 (1951). "It was within the province of the [trier] to draw reasonable and logical inferences from the facts proven.

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[4] The defendant has not claimed any illegal influence on the jury.

State v. *Pundy*, 147 Conn. 7, 12, 156 A.2d 193; *State* v. *Foord*, 142 Conn. 285, 294, 113 A.2d 591." *State* v. *Benton*, supra, 410. Also, the jury can draw an inference from the facts they found as the result of other inferences. *State* v. *Gonski*, 155 Conn. 463, 468, 232 A.2d 483 (1967); *State* v. *Hayes*, 127 Conn. 543, 18 A.2d 895 (1941); 1 Wigmore, Evidence (3d Ed.) § 41. The inquiry of this court is directed to whether, on the facts established and the inferences reasonably to be drawn therefrom, the verdict can be supported. *Jackson* v. *Virginia* (97 U.S.L.W. 4883 [June 28, 1979]); *State* v. *Benton*, supra, 410.

The state established that the defendant had the opportunity to kill his wife. There was testimony that they were alone, involved in a violent argument, that he did not love her and that he wanted to leave her for another woman. It also established that Wanda Avcollie had not consumed enough drugs or alcohol to affect her judgment and physical reactions and that she died between 11:30 and 12 midnight, not at 2 a.m. as the defendant contended. Further, the state produced evidence showing some of the defendant's claims to be inconsistent with statements originally made to the police. The state also produced evidence in direct contradiction to the testimony given by the defendant, i.e., the state's witnesses testified that there was a very small amount of alcohol in Mrs. Avcollie's body as opposed to the large quantity the defendant contended she drank; the neighbor's child stated that the defendant drove down the street and into the driveway around midnight, while the defendant contended it was much later; and the state's experts testified there were no traces of valium in Mrs. Avcollie's body post mortem, while the defendant's testimony as to the finding of the pills was no doubt to imply that Mrs. Avcollie had taken them. Once the fact of a

murder had been established, the jury could reasonably infer from the evidence outlined above that the defendant was the perpetrator and that he intended to do what he did.

There is error,[5] the judgment of the trial court is set aside, the jury verdict is reinstated, and the case is remanded with direction to render judgment that the defendant is guilty and that sentence be imposed.

In this opinion the other judges concurred.

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[5] The state's final claim, which is totally irrelevant to the main issue raised in this appeal, is that the trial court improperly excluded evidence found in the defendant's automobile. We will not consider this issue because it is not properly before us. The trial court granted the state permission to appeal its setting aside of the jury's verdict. The question presented to this court was whether the jury had sufficient evidence before it from which it could have concluded that the defendant was guilty beyond a reasonable doubt. The evidence the state is claiming was improperly excluded was obviously not considered by the jury in reaching its verdict. Therefore, it cannot be considered by this court on appeal. In addition, the pressing of this claim on appeal is unnecessary overreaching on the part of the state. Whether it could be considered even under other reasons of appeal is problematical in view of the double jeopardy issue, but, at any rate, the sole issue in this appeal was whether the evidence before the jury was sufficient to support their verdict. It was improper to raise this claim in this appeal.

Appendix B

STATE OF CONNECTICUT *v.* BERNARD AVCOLLIE

HOUSE, C. J., LOISELLE, BOGDANSKI, LONGO and SPEZIALE, JS.

Argued November 1—decision released December 20, 1977

Motion by the defendant to dismiss the state's appeal from the setting aside of a guilty verdict in the Superior Court in the judicial district of Waterbury. *Motion denied.*

The defendant filed a motion for reargument which was denied.

Theodore I. Koskoff and *John D. Jessup,* in support of the motion.

Francis M. McDonald, Jr., state's attorney, in opposition.

This opinion is the result of collaboration on the part of all members of the court to an unusual degree. See *State* v. *Hayes,* 127 Conn. 543, 549, 18 A.2d 895. The defendant moves to dismiss the state's appeal challenging the court's action in setting aside the jury's verdict of guilty and rendering a judgment of acquittal. The pertinent facts of the case are as follows.

On July 20, 1977, the foreman of a jury of twelve announced in open court that a verdict had been reached. After calling the roll of the jury, the clerk, following established procedures, asked, "Is Bernard Avcollie guilty of the crime of murder, in violation of § 53a-54a of the Connecticut General Statutes, or not guilty?" to which the foreman responded, "He is guilty."

At this point, the defendant's counsel asked that the jury be requested to retire, prior to acceptance of the verdict. After the court had excused the jury, the de-

fense renewed several pending motions including a motion under Practice Book § 255 that the verdict be set aside, that an order for a judgment of dismissal be entered, and that the defendant be discharged from custody. The court responded, expressing its intention to set aside the verdict, whereupon the state requested permission to appeal to the Supreme Court:

"Mr. McDonald: I am asking for permission to take this matter to the state's Supreme Court.

The Court: I will rule on that at the proper time.

Mr. McDonald: I would like to ask for a ruling now.

The Court: The motion is denied.

Mr. McDonald: Then you are not giving me permission to take an appeal to the state's Supreme Court?

The Court: Bring in the jury, sheriff."

Upon the jury's return to the courtroom, the court announced: "I am setting aside the verdict of guilty and acquitting the defendant, under the rules, under the prerogatives vested in me as a judge of this court." The jury were discharged, and, in response to a request by the defendant's counsel that the accused be discharged from custody and his bond released, the court replied, "He may be discharged." When the state's attorney excepted, the court explained, "There is no fear that he is going to flee the jurisdiction. The bond may be released."

On July 22, 1977, the court heard argument on the state's motion to take an appeal.[1] Counsel for the defendant appeared with the defendant to argue against the motion, but stated, "We are not here presenting our argument in the case of *State of Connecticut* v. *Bernard Avcollie* because that case does not exist any more by

[1] See General Statutes § 54-96.

virtue of what already happened. We are here as a courtesy to the court." The court stated that it had called the hearing because the transcripts of the July 20 hearing revealed an ambiguity in the discourse between the court and the state's attorney. The court, then, proceeded to deny the state permission to appeal. "I have given a great deal of thought to allowing you to appeal this case and I have no reason to not allow you to do it but you will do it by way of a writ of error, which is your right under the statute."

Finally, again on the trial court's motion, another hearing was held on August 1, 1977, for "a rehearing on the state's request for permission to appeal." On August 3, the court "rescinded" its previous denial of permission to appeal and granted the requested permission.

The state has appealed to this court, and the defendant now seeks to have the appeal dismissed.

The issues to be determined by the motion to dismiss the appeal are:

1. Whether a valid jury verdict of guilty exists in this case.

2. Whether the court's July 20, 1977, "discharge" of the defendant terminated the court's in personam jurisdiction, thereby rendering the subsequent hearings invalid.

3. Whether, by virtue of the trial court's July 22 "denial" of permission to appeal, this court has subject-matter jurisdiction under General Statutes § 54-96.

The defendant claims that, since the jury's verdict of guilty was never formally "accepted" by the court, a valid

guilty verdict never existed in this case. On the basis of this premise, it is argued that any action taken by this court unfavorable to the trial court's action—claimed by the defendant to constitute a judgment of acquittal—would necessitate another trial, in violation of the double jeopardy clause of the United States constitution.

To substantiate its claim that no valid jury verdict exists, the defendant relies heavily upon *State* v. *DiPietro,* 120 Conn. 537, 538-39, 181 A. 716, in which the court delineates the "settled practice in this [s]tate" for the establishment of a valid jury verdict: "[T]he course of proceedings upon the return of the jury into court in a criminal case is substantially as follows: The court being in actual session, the clerk calls the roll of the jury and asks if they have agreed upon their verdict. If the foreman answers that they have, the clerk then asks whether they find the accused guilty or not guilty. The foreman answers 'guilty' or 'not guilty' as the case may be. The clerk then says to the jury: 'Gentlemen of the Jury, harken to your verdict as accepted and ordered recorded by the court. You upon your oaths do say that the prisoner at the bar is guilty (or not guilty) so say you, Mr. Foreman, and so, gentlemen, say you all.' The foreman and members of the jury: 'We do.'" The apparent purpose of this procedure is to ensure that the court, counsel and the jurors have a common understanding of the verdict, that it is the verdict to which each juror has assented, and that ample opportunity is afforded to cure any misunderstanding. *Ferris* v. *Hotel Pick Arms, Inc.,* 147 Conn. 72, 74, 157 A.2d 106; *State* v. *DiPietro,* supra. While it is true, as the *DiPietro* court recognizes (p. 539), that "[u]ntil a verdict is accepted by the court, it is not a verdict at all," it does not follow that a verdict is deficient if the process leading to

acceptance does not precisely conform to the usual, accepted practice.[2]

In the present case, the usual practice outlined in *DiPietro* was begun: the jury returned to the courtroom, in which both counsel and the defendant were present, and the judge asked whether they had reached a verdict; the jury foreman answered, "We have, Your Honor," and the clerk called the name and number of each juror, the juror rising in response; the clerk asked, again, if they had reached a verdict, and, again, the foreman answered, "Yes, we have"; the clerk asked the accused to stand and face the jury and the jury, having been reminded that they were sworn in, were asked, "What say you as to case number 12,468, *State of Connecticut* v. *Bernard Avcollie.* Is Bernard Avcollie guilty of the crime of murder, in violation of § 53a-54a of the Connecticut General Statutes, or not guilty?" to which the foreman responded, "He is guilty." At this juncture, the defense counsel intervened, asking that the court excuse the jury "before the verdict is accepted." In the absence of the jury, during the following interaction among both counsel and the court, the

[2] None of the cases which affirms the procedure outlined in *State* v. *DiPietro*, 120 Conn. 537, 181 A. 716, requires rigid adherence to it; it is, rather, a practice referred to as "approved procedures in receiving the verdict"; *Tough* v. *Ives*, 162 Conn. 274, 278, 294 A.2d 67; or, "[t]he procedure which has been followed in our courts for many years." *Ferris* v. *Hotel Pick Arms, Inc.*, 147 Conn. 72, 74, 157 A.2d 106. As the court in *Raymond* v. *Bell*, 18 Conn. 81, 90, stressed, "[a]ll that is required is, that the verdict should be rendered in open court by the whole jury. The only convenient and proper form to do this, is that which is usually practiced in our superior and county courts; but it does not follow that there may not be other less convenient and less proper modes by which a verdict may be received." See also 4 Wharton, Criminal Procedure (12th Ed. 1976) § 583.

court in response to the defendant's own motion expressed its intention to "set aside the verdict."

The defendant's motion to have the verdict set aside arose under § 255 of the Practice Book, which provides, in part: "*After the acceptance of a verdict* . . . a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside." (Emphasis added.) By interrupting the established procedure for acceptance of the verdict, the defendant effectively waived compliance with that procedure. By setting aside the verdict, the court impliedly accepted the jury's verdict of guilty, and this acceptance became final upon his subsequent announcement of his action to the jurors.[3] The procedure followed, while not in compliance with the preferred, established form commonly adhered to, provided adequate safeguards to ensure a common understanding of the verdict: the verdict was rendered in open court by the foreman in the presence of the entire jury, the court, and counsel. Further, the defendant makes no claim that the jury did not assent to the verdict as announced by their foreman, and adequate opportunity was afforded the jury to clarify any misunderstanding. Under these circumstances it cannot be said that a valid jury verdict of guilty, subsequently set aside by the court, does not exist in this case.

Since a valid verdict exists, no double jeopardy bar rises to preclude an appeal in this case. The state's appeal seeks a reversal of the court's action in setting aside the verdict.

[3] In order for a verdict to be set aside, a verdict must exist. See *State* v. *Searles*, 113 Conn. 247, 256, 155 A. 213, and *Black* v. *Griggs*, 74 Conn. 582, 584, 51 A. 523. (Both courts distinguish the power of a judge to return the jury for further consideration from the power to set aside a verdict, emphasizing that in the former situation the power must be exercised *before* the verdict is accepted.)

If error is found, no further fact finding, no additional trial, would be necessary, for the jury verdict would simply be reinstated. In a recent opinion, the United States Supreme Court stated: "When a case has been tried to a jury, the Double Jeopardy Clause does not prohibit an appeal by the Government providing that a retrial would not be required in the event the Government is successful in its appeal. *United States* v. *Wilson*, . . . [420 U.S. 332, 344-45, 352-53, 95 S. Ct. 1013, 43 L. Ed. 2d 232]. *When this principle is applied to the situation where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted.* In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict. To be sure, the defendant would prefer that the Government not be permitted to appeal or that the judgment of conviction not be entered, but this interest of the defendant is not one that the Double Jeopardy Clause was designed to protect." (Emphasis added.) *United States* v. *Jenkins*, 420 U.S. 358, 365, 95 S. Ct. 1006, 43 L. Ed. 2d 250. The principle enunciated in that case is clearly applicable to the case before us.

The defendant claims that his discharge from custody and release from bond by the court, directly after the verdict was set aside, terminated the court's in personam jurisdiction, rending the subsequent rehearings on July 22 and August 1 improper.[4] In those cases in which the state, at

[4] Both parties at the time the motion to dismiss was argued, and in this court, argued in relation to Practice Book § 481. This provision, repealed on October 1, 1976, remained applicable to proceedings, such as this, in which the arrest was made or a summons issued prior to that day.

the time judgment is rendered, expresses an intention to seek an appeal[5] the defendant is not entitled to discharge until the state's motion to appeal is finally determined. "It is necessary that he [the prosecutor] determine at the time of the judgment that he ought to ask the court for permission to take such appeal, so that the accused shall not be forthwith discharged; to that he is entitled *unless the prosecutor shall move for such permission.* If permission be granted, he will not be entitled to discharge until the appeal has been determined in his favor, or withdrawn." (Emphasis added.) *State* v. *Carabetta,* 106 Conn. 114, 119, 137 A. 394.

It is clear from the transcript that on July 20, 1977, when judgment was rendered setting aside the jury verdict, the state immediately expressed its intention to seek permission to appeal. Unless the court clearly denied the state permission to appeal at that time, the defendant was not then entitled to discharge. No such clear denial is apparent. Indeed, the July 20 transcript reveals that the court, having stated in response to the state's motion to appeal, "I will rule on that at the proper time," failed subsequently to respond to the state's attorney's direct inquiry as to whether permission had been denied. Recognizing the ambiguity which appears on the face of this transcript as to the status of the state's appeal, the court called for a full hearing on the state's motion on July 22. Both counsel argued the motion and it was, finally, denied on that day, the court indicating, "I have given a great deal of thought to allowing you to appeal this case." Clearly, had the court already denied the state's motion to appeal, no further consideration would have been necessary. Because no final

[5] For a full discussion of appeals by the state in criminal actions, see *United States* v. *Wilson*, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232.

decision as to the appeal was made on July 20, any discharge granted on that day was ineffective because the defendant was not then entitled to full discharge. The court itself, in ordering a discharge and releasing the defendant from bond, did not intend to release the defendant from the court's in personam jurisdiction, for, upon the state's exception, the court assured counsel, "There is no fear that he [the defendant] is going to flee the jurisdiction."[6] It is therefore evident that the court retained in personam jurisdiction over the defendant until the state's motion to appeal was finally acted upon by the court on July 22.

General Statutes § 54-96 provides: "Appeals from the rulings and decisions of the superior court, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court. . . ." The original version of this statute, enacted in 1886, clearly indicates an intention by the legislature to extend the right of appeal in criminal cases to the state. *State* v. *Lee,* 65 Conn. 265, 278, 30 A. 1110. The provision that permission from the trial judge be obtained was a limitation on the right of appeal granted the state. This condition is generally considered to be a prerequisite to appeal by the state. *State* v. *Audet,* 170 Conn. 337, 340-42, 365 A.2d 1082. However, as the dominant intention of the legislature was to extend the right of appeal to the state, the limitation placed upon that right is one which must be so exercised as to avoid abuse and unreasonable consequences. *Tileston* v. *Ullman,* 129 Conn. 84, 94, 26 A.2d 582; *State* v. *Nelson,* 126 Conn. 412, 11 A.2d 856; *Dorman* v. *Carlson,* 106 Conn. 200, 203, 137 A. 749; 73

[6] Effectively the court was releasing the defendant on his own recognizance, rather than fully discharging him.

Am. Jur. 2d, Statutes, § 265. The court's grant or denial of the state's motion to appeal constitutes a "judicial determination" within the court's discretion. *State* v. *Carabetta,* supra, 118. Ordinarily, this court will not review rulings made in the exercise of a court's discretion. Maltbie, Conn. App. Proc. § 59. In those cases of manifest abuse, however, where injustice appears to have been done, this court will grant review to determine whether the court's exercise is "so unreasonable as to constitute an abuse of discretion." *Hayward* v. *Plant,* 98 Conn. 374, 382, 119 A. 341; see also *State* v. *Brown,* 169 Conn. 692, 702, 364 A.2d 186. Section 54-96 does not, therefore, preclude an appeal by the state seeking revief of the court's denial of permission to appeal in those unusual cases in which the state has properly and expeditiously expressed its intention to seek appeal at the time of judgment and the court's denial was so arbitrary as to constitute an extreme abuse of discretion rendering the denial ineffective. In such cases the statute's condition requiring the court's permission to appeal cannot serve to insulate a trial court from review by this court; rather, the statute as a whole remains operative to allow appeal by the state. A proviso should be "so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment." *Shilkret* v. *Musicraft Records, Inc.,* 131 F.2d 929, 931 (2d Cir.), cert. denied, 319 U.S. 742, 63 S. Ct. 1030, 87 L. Ed. 1699; see also 73 Am. Jur. 2d, Statutes, § 321.

In the present case, just such a clear and extreme abuse of discretion is evident. In denying the state permission to appeal on July 22, 1977, the court, speaking to the state's attorney, commented, "I have given a great deal of thought to allowing you to appeal this case and I have no reason to not allow you to do it." Setting aside a verdict rendered

Appendix B

by a jury is an extremely serious matter. See *Camp* v. *Booth,* 160 Conn. 10, 13, 273 A.2d 714. To deny permission to appeal such a ruling cannot be so arbitrarily done. Because it is clear, by the court's own admission, that there was no considered reason for denying the state the opportunity to appeal, its action is arbitrary and an abuse of its discretion, rendering the refusal invalid.

In those cases in which an abuse of discretion is manifest or where injustice appears to have been done, reversal is required. *State* v. *Brown,* supra. Ordinarily, when confronted with such a situation, this court would reverse the trial court's denial of permission to appeal; see *Husted* v. *Mead,* 58 Conn. 55, 69, 19 A. 233; remanding the case to the trial court with directions. In this case, we would direct the trial court to enter an order granting the state permission to appeal. In light of both the trial court's expression of its intention to grant the appeal,[7] and the fact that our directions would, in any case, be binding upon the court below; Maltbie, Conn. App. Proc. § 345; we find a remand to be unwarranted. As this court in *Campbell* v. *Rockefeller,* 134 Conn. 585, 589, 59 A.2d 524, noted, "[t]o return the case to the trial court . . . would necessarily bring about the same result as would come from our determination of the matter now; it would be a useless procedure, for the final result would not be changed." We therefore find that the state is within its rights in pursuing this appeal pursuant to § 54-96.

On the basis of the foregoing, it is determined that this court has jurisdiction over this appeal, within the meaning of § 54-96. The defendant's motion to dismiss the appeal is denied.

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[7] On August 3, the trial court, on its own motion, "rescinded" its July 22 order denying the state permission to appeal and granted the state's motion to appeal.

Appendix C

SUPERIOR COURT

JUDICIAL DISTRICT OF WATERBURY

July 20, 1977

No. 12,468

STATE

vs.

BERNARD L. AVCOLLIE

HON. SIMON S. COHEN, *Judge*
A JURY OF TWELVE

APPEARANCES:

For the State:

FRANCIS M. McDONALD, JR., ESQ.
State's Attorney

JOSEPH A. HILL, ESQ.
Assistant State's Attorney

For the Accused:

THEODORE I. KOSKOFF, ESQ. &
JOHN D. JESSEP, ESQ., *of Counsel*

Arthur Haffner, C.S.R.
Official Court Reporter
Superior Court, Waterbury

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(Court resumed.)

The Court: Call the jury please.

(Jury enters courtroom.)

The Court: Ladies and gentlemen, have you reached a verdict?

The Foreman: We have, Your Honor.

The Court: Mr. Clerk, you may inquire.

The Clerk: Ladies and gentlemen of the jury, as I call your name and number would you please rise and remain standing.

Number 96, Edith Cass. Number 13, Bernard Smith. Number 72, John Barna, Jr. Number 130, Joseph Drennan. Number 225, Waltraud Yeager. Number 213, Paul Fontaine. Number 335, Sally Cady. Number 328, James Brown. Number 198, Robert Wallin. Number 102, Consolato Mallamaci. Number 361, Howard Harper. Number 410, William Skillman.

Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: Yes, we have.

The Clerk: Would the accused stand and face the jury.

Ladies and gentlemen of the jury, look upon the accused, you that have been sworn. What say you as to Case Number 12,468, State of Connecticut versus Bernard Avcollie. Is Bernard Avcollie guilty of the crime of Murder, in violation of Section 53a-54a of the Connecticut General Statutes, or not guilty?

The Foreman: He is guilty.

Mr. Koskoff: Before the verdict is accepted, Your Honor, would you ask the jury to retire?

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The Court: You may retire.

(Jury leaves courtroom.)

Mr. Koskoff: If Your Honor pleases, for the reasons that we have previously stated and because of the fact that there was no evidence upon which the accused in this case could have been found guilty of the crime for which he was charged, I ask you to rule on the two previous motions that I have made. At the conclusion of the State's case I asked Your Honor, I moved for a dismissal because of insufficiency of evidence. I asked you for a judgment of acquittal and I asked you for a directed verdict. This was repeated under Section 255 a short while ago. And I asked that you set aside the verdict or either direct a verdict or set this verdict aside, order the accused a judgment of dismissal and discharge him from custody and bond.

Mr. McDonald: We oppose this motion, Your Honor. There was the choice of trial by jury, the jury heard this case, and after a very explicit charge by the Court with respect to their obligation to find the accused guilty beyond a reasonable doubt repeated oftentimes in the charge, and with the charge of murder alone submitted to the jury, the jury did return a verdict of guilty.

We submit that the Jury's verdict should stand.

The Court: Anything further?

Mr. Koskoff: No, Your Honor.

The Court: This, of course, presents a very difficult question for the Court, realizing it is trial by jury. I realize also that the Court has a responsibility to the accused and to the State. As a matter of fact, he probably could be called the thirteenth juror.

Mr. McDonald: I don't think so, Your Honor.

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The Court: It is fundamental that the trier may not reach a conclusion of guilty where the facts established by the evidence, including those reasonably and logically inferred from other proven facts, are rationally consistent with the innocence of the accused.

A conclusion of guilty requires proof beyond a reasonable doubt. And proof to that extent is proof which precludes every reasonable hypothesis except that which it tends to support, and it is consistent with the defendant's guilt and inconsistent with any other rational conclusion.

In criminal jury trials the State has the burden of producing evidence from which the jury may rationally conclude that the defendant has been proven guilty of the essential elements of the crime beyond a reasonable doubt.

The Court does not feel that the burden was borne here by the State.

Mr. McDonald: I would like to be heard with respect to this motion, Your Honor.

The Court: May I finish, please?

Mr. McDonald: Yes, Your Honor.

The Court: The Court would feel that a manifest injustice would take place when this verdict is so plain as to justify relief from the Court.

I don't know what has influenced the jury but evidently it has been a failure to understand the charge in this case and whatever extraneous matters may have interfered with a fair trial as a result of outside influences.

The Court feels under those circumstances that the verdict should be set aside and the judgment of acquittal entered.

I realize that this is a case of circumstantial evidence but even cases of circumstantial evidence must be proven beyond a reasonable doubt.

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As I have said before, and I have said it before in my charge on several occasions, and I repeat it. The law never permits inferences to be drawn or assumptions depending upon other inferences or assumptions.

It is the Court's feelings that this case does not warrant conviction under the proof as brought by the State.

Bring in the jury.

Mr. McDonald: May I be heard, Your Honor?

The Court: Yes.

Mr. McDonald: I, of course, most respectfully disagree with Your Honor's decision. I think the jury spoke and it was the defendant's claim that he should have a jury trial.

Of course, we are requesting at this time on behalf of the State permission to appeal Your Honor's decision. And we would like a ruling on that immediately, if Your Honor pleases, since we feel a substantial miscarriage of justice has occurred with respect to the State's rights.

The Court: The Supreme Court has spoken many times, many times in the past, about the judge's responsibility in the trial of a criminal case. And on many, many occasions, probably long before even you and I were born, the Supreme Court has entered a mandate that said that the trial court has a responsibility when a motion for a judgment of acquittal is entered, either before or after a jury verdict and that the Court's responsibility, if the evidence is not sufficient to support a verdict, that it should be set aside. And I so do it here.

Mr. McDonald: I am asking for permission to take this matter to the State's Supreme Court.

The Court: I will rule on that at the proper time.

Mr. McDonald: I would like to ask for a ruling now.

The Court: The motion is denied.

Mr. McDonald: Then you are not giving me permission to take an appeal to the State's Supreme Court?

The Court: Bring in the jury, sheriff.

Mr. McDonald: May I have an exception, Your Honor?

The Court: An exception may be noted.

(Jury enters courtroom.)

The Court: Ladies and gentlemen of the jury, your verdict has been noted by the Court. In accordance with the Court's responsibility assumed by me, it is the Court's feeling that either you did not understand the charge or that you did not weigh all of the evidence properly, and that the verdict should be set aside. And I am so doing it at this time.

I am setting aside the verdict of guilty and acquitting the defendant, under the rules, under the prerogatives vested in me as a Judge of this Court.

You may now be discharged with the thanks of the Court.

(Jury excused.)

The Court: Anything further?

Mr. Koskoff: Your Honor, may the accused be discharged from custody and his bond released?

Mr. McDonald: I oppose that application, Your Honor, in view of the fact we intend to seek a writ of error immediately from the State's Supreme Court.

The Court: He may be discharged.

Mr. McDonald: May I have an exception again?

The Court: There is no fear that he is going to flee the jurisdiction. The bond may be released.

Mr. McDonald: May an exception be noted.